A time-map for international law: 2017 Cambridge International Law Journal– Lauterpacht Centre for International Law Annual Lecture*

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Hannah Arendt was a German-Jewish witness of the grand infamies of the twentieth-century, a classicist, a political theorist, a social commentator and a cartographer of time. In that last capacity, she presents the international lawyer with a set of concepts to gauge the meaning of international legal time, its relationship to international history, and the part of international law in triggering new historical cycles. Three concepts developed by her stand out for how an international lawyer might reconceive the part of international law in international history and importantly, against catastrophic world tragedies that ask for innovative regulatory response, its redesign. The concepts of a time-gap, time-sequence and historical-cycle and repetition of revolution present possible coordinates for drawing different time-maps for international law. The question raised here follows Arendt to ask: what might a time-map for international law look like if international lawyers notice the gaps, rhythm and sequences that set and reset their part in international historical time? Starting at Potsdam, in 1945, settles the question of a time-map on a series of lines and boundaries that restarted time then under the auspice of international agreement.

Keywords: international legal history, Berlin (Potsdam) Conference 2 August 1945, cartographies of time, Hannah Arendt

1 MIXING LEGAL AND HISTORICAL CARTOGRAPHIES OF TIME

Immediately before the 1950 publication of her celebrated history of mid-century terror, *The Origins of Totalitarianism*, Hannah Arendt published what could be its epilogue and its reason.¹ The short essay, ‘The Aftermath of Nazi Rule: Report from Germany’, catalogued the political theorist’s observations from her return to Germany in 1949 as an observer for the Jewish Cultural Reconstruction.² Her departure from her birthplace in

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1. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, New York 1951).

2. See Hannah Arendt, ‘The Aftermath of Nazi Rule: Report from Germany’ (*Commentary Magazine*, 1 October 1950) <https://web.stanford.edu/dept/DLCL/files/pdf/hannah_aftermath_of_nazi_rule.pdf> accessed 19 February 2018. For biographical details of Arendt’s visit to post-war Europe in 1949, see Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (Yale UP, New Haven 1982) 244–5.

1933 traced the racial line of late-modern Jewish exile westward through France and finally, in 1941, to safety in America. As a German-Jewish refugee, still stateless and without formal political allegiance, Arendt discovered the post-Nazi state to be an unlikely return. The dismemberment of Germany into four zones of British, American, French and Soviet occupation according to the Protocol agreed by the *Berlin (Potsdam) Conference* on 2 August 1945 did not motivate a civic response to history:

Amid the ruins, the Germans mail each other picture postcards still showing the cathedrals and market places, the public buildings and bridges that no longer exist. And the indifference with which they walk through the rubble has its exact counterpart in the absence of mourning for the dead, or in the apathy with which they react, or rather fail to react, to the fate of the refugees in their midst. This general lack of emotion ... is only the most conspicuous outward symptom of a deep-rooted, stubborn, and at times vicious refusal to face and come to terms with what really happened.³

No less conspicuous was the failure of the history-response recorded at Potsdam to face up to what really happened with new interventions to interrupt the wartime experience of servitude, domination and disenfranchisement. International law turned history inside-out with a map for regional security and German reconstruction that recycled, unwittingly and yet by design, the old habits of state with new helmsmen and new details of wrong to resolve.

Arendt did not expect international law to put Germany back on its feet though she did note the disappointments of its cartographical divisions.⁴ Putting Arendt's concept of history to work in the context of the Potsdam Protocol interprets the geographical divisions of post-war occupation as a metaphor for a new kind of cartography which highlights the interdependencies of legal and historical time. Her history-response inspires the visualisation of a time-map or rather a series of time-maps which accentuate variations or details of the relationship between international law and history where *time* is the temporal measure which tracks the progression of the past, present and future, and *history* is the record or memory of what happened.⁵ The idea of a map pays attention to the spatial consciousness of international law which settles and resets historical patterns through agreements about territory. Although there is nothing new about identifying international law as an historical category nor the idea that the historical consciousness of international law is terrestrial, the symbolic motif of a time-map alerts international lawyers to the passage and measure of legal time, the complications and habits of time-sequence, and the temporal opportunities for innovation.⁶ A time-map rearticulates historical problems as problems of law and law-making. The configuration assumes legal time traces historical time, and might, in the absence of civic and political indifference, articulate new modes of governance and entitlement to interrupt harmful

3. Arendt, 'Report from Germany' (n 2) 342.

4. Ibid 346–53.

5. The definition of time as a manner of describing questions of duration, progress, change and the tenses of past, present and future reflects the idea of time in Lynn Hunt, *Measuring Time, Making History* (Central European UP, Budapest 2008) 4. The idea of history as the recovery of past idioms or vocabularies (including visual articulations such as maps, graphs, geometry and iconography etc) and symbolic representations that constitute the reality of the past and convey how historical actors made sense of their world is a variation of the definition of intellectual history considered in Annabel Brett, 'What is Intellectual History Now?' in David Cannadine (ed), *What is History Now?* (Palgrave Macmillan, London 2002) 113–31.

6. As to the terrestrial dimension of the historical consciousness of international law, see Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulmen tr, Telos Press Publishing, New York 2006).

traditions. Mapping legal time with Arendt as guide translates her history-concept into the vocabulary of international law for a time and place when the whole world paused to rethink and remap the future of Germany.

This approach to international legal history reads theories of historical time circulating at times of significant legal initiative to be part of the intellectual current which gives those interventions meaning and, in reverse, sources meaning from law. Arendt's afterword to mid-century terror, including her reframing of the late-modern idea of history, belongs to the interval shared by the world-making and peace-making projects settled by the Big Three at Potsdam. Shared temporal contexts and projects are important. Arendt's history-concept references back to her experience as a witness of the Nazi state and the failure of twentieth-century revolution. From that place, she argues against the late-modern frame of rectilinear history as process and for an alternative that revives and revises a map of circular time she derives from the ancients. For her contemporaries who met at Potsdam in 1945, her question about how to understand and respond to the past became their question about what to do about Germany and meant territorial and political adjustment under international occupation. The Potsdam Protocol missed its opening because it made no historical correction. Paying attention to Arendt is also another way of doing intellectual history that explores how historical or philosophical thinking elucidates other events, people, institutional arrangements and ideas placed in the same time-interval. Or, equally, how a historically situated idea might act as a provocation to subsequent generations of actors, who come later and who face new pressures amid new constellations of events, ideas and political practice. This is the 'poetic' yield of intellectual history noticed by Annabel Brett which uncovers lost traditions of 'speaking and seeing the world, once current, now exotic (and perhaps) full of possibility' to orientate and inspire a later circle of actors. The 'poetic yield' of Arendt's thesis of history for international law has another dimension for all those interested to study the boundaries set at Potsdam. Her thought helps international lawyers decode the mystery of what happened at Potsdam by international agreement by noticing alternative ways to map time.⁷

Arendt's thesis of history inspires a reinterpretation of the peace map settled at Potsdam as a point of historical return rather than innovative departure. The timing and context of the adjustment is important. The end of war exemplified a turning point of historical significance when, as Lynn Hunt describes, 'time becomes urgent' and can run in multiple, different directions.⁸ International law annotates such culminating moments to record the success (or failure) of the anticipated beginning. The Potsdam map is a time-map and a visual representation of the international legal record, but it does not resemble a map made for peace. Arendt's history thesis is suggestive for reimagining the Potsdam map as one of three related time-maps which clarify the relationship between legal and historical time: the first emphasises the repetitious patterns of linear time-sequence; the second rethinks historical and legal time as tracing a circle in which every ending is also a beginning; and the third accentuates the space between past and future which accompanies every history cycle.

2 TIME-MAP I: PEACE LINES AND TIME-REPETITION

One time-map reinterprets the peace-map agreed by the Big Three at Potsdam as a spatial analogy for the repetition of historical and legal time: not a peace-map but rather a

7. Brett (n 5) 123 and 127–8.

8. Hunt (n 5) 6.

map of historical repetition. That historical and legal time travel in geometrical line-sequences or circles, or that international legal history possesses a spatial consciousness, is routine for lawyers and historians.⁹ Carl Schmitt's pre-war conception of 'global linear thinking' elucidates, for example, the historical habit of states to create order through territorial acquisition and the continual adjustment of boundaries.¹⁰ According to Schmitt, legal time follows patterns of spatial orientation because:

[n]ot only logically, but also historically, land appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law. It is the reproductive root in the normative order of history.¹¹

A global concept of geography in which the entire world (land, sea and then air) is visible to international law and consequently divisible by conquest or agreement represents the modern chapter in the *nomos* or normative order of the planet.¹² Arendt's response to the modern crisis of the nation-state and its imperial ambitions agrees in theory with an evolving normative order reflected in continual territorial adjustments. Her theorising of history, however, disagrees with the idea of historical time as a linear progression which reproduces and predicts certain patterns. She seeks out a non-linear explanation for history not to make sense of fragmentary or chaotic pasts, which Gerry Simpson notices can helpfully schematise the complexities of international history, but rather to disrupt the patterns of time-sequence and time-repetition that tie the present to the past.¹³

2.1 A peace-map

The Soviet, British and American leaders designated the territorial arrangement for post-war Germany as a peace-map. Their design for peace used techniques familiar to foreign occupation following military conquest to materialise the unconditional surrender of the Nazi state on 8 May 1945. To that end, the Potsdam Protocol agreed to divide Germany into four zones of Allied occupation, each exercising supreme authority in its quarter and cooperatively as delegates of a Berlin-based Control Council.¹⁴ French control in the far Western zone followed the invitation of the Big Three to answer its experience of war-time occupation and its historical desire for security by dismemberment of its belligerent neighbour.¹⁵ The cartographical vision of peace reflected the vocabulary of war.

9. Ibid 4; Gerry Simpson, 'Linear Law: The History of International Criminal Law' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, Oxford 2014) 160.

10. Schmitt (n 6) 87–90; see also G L Ulmen, 'The Concept of Nomos: Introduction to Schmitt's Appropriation/Distribution/Production' (1993) 95 *Telos* 39.

11. Schmitt (n 6) 48.

12. Ibid 86–100.

13. Simpson (n 9) 166–9.

14. Protocol of the Proceedings of the Berlin (Potsdam) Conference (USSR, US and UK) (signed 1 August 1945) 2 *Foreign Relations of the United States* 1383 ('Potsdam Protocol'), part II(A)(1). For a copy of the map detailing the territorial divisions agreed by the Potsdam Conference and circulated by the occupant powers throughout Germany in 1946, see Figure 1 and fn 16.

15. Although France did not participate in the negotiations at or preceding the Potsdam Protocol, its hopes to divide Germany into rival states were prominent in French foreign policy from the seventeenth century, tracking from Cardinal Richelieu (1585–1642) to Napoleon III (1808–73) to Georges Clemenceau (1841–1929): Philip E Mosely, 'Dismemberment of Germany: The Allied Negotiations from Yalta to Potsdam' (1950) 28(3) *Foreign Affairs* 487, 487.

Figure 1 Germany: map of the occupation areas 1946¹⁶

The Potsdam Protocol formalised negotiations between the same three powers in the preceding months at Yalta, in the February before war ended, and then at Berlin immediately after Germany's surrender.¹⁷ The agreed purposes guiding occupation envisaged a system of political and economic decentralisation and radical reform that would prepare Germany to re-enter international affairs on a democratic and cooperative basis (Potsdam Protocol Art. II(A)(3)(iv)).¹⁸ Peace meant reprisal and 'preventing war' and 'eliminating Germany's war potential'¹⁹ through disarmament, de-Nazification, punishment of Nazi leaders and officials, democratisation, economic

16. Source: Johannes Sünnecke, 'Germany: Map of the Occupation Areas' (Atlanta Map, Frankfurt am Main 1945) <<https://www.raremaps.com/gallery/detail/34456?view=print>> accessed 19 February 2018.

17. Report of the Crimea (Yalta) Conference (USSR, US and UK) (11 February 1945) Foreign Relations of the United States 968 ('the 1945 Yalta Conference'); Declaration Regarding the Defeat of Germany and Assumption of Supreme Authority by Allied Powers (signed 5 June 1945, supplemented by additional requirements 20 September 1945) 60 Stat 1649 ('1945 Berlin Declaration'); Berlin (Potsdam) Conference (proceedings of Potsdam Conference from 17 July to 2 August 1945 approved in Berlin (Potsdam) on 2 August 1945) in US Department of State, *A Decade of American Foreign Policy: Basic Documents 1941–1949* (US Government Printing Office, Washington 1950) 34.

18. Potsdam Protocol, part II(A)(3)(iv).

19. Ibid part II(A)(3)(i)(b) and (A)(11).

controls and moral retribution. The moral dimension of the international legal project expressly sought to convince Germans of their responsibility for what happened (Potsdam Protocol Art. 3(ii)).²⁰ The restriction of political and economic agency went part-way to this end through the physical presence of foreign forces and the implementation of projects, different in each zone, for re-education and the remodeling of social life. Arendt knew occupation alone could not achieve the desired moral reckoning without a shift in historical consciousness to take account of what happened. She did not pass judgment on the historical consciousness of the occupant states which, of course, represented the interests of the victorious powers and liberated territories. Unsurprisingly, the occupant states calculated international responsibility for the past according to priorities which ultimately served their own interests in regional security and disarmament and placated a wish for retribution, including reminding the vanquished state of its diminished sovereignty. This version of historical consciousness put the political, economic and social functionality of Germany second to the interests of the new locus of sovereign control.

The plan for German dismemberment gave the Potsdam Protocol belligerent connotations. The question of German dismemberment by partition circulated in Allied discussions throughout the war. Its increasing prominence in discussions when Allied victory seemed more plausible was not, however, without significant hesitation from all sides about the practicalities and utility of division.²¹ Both liberal and Socialist allies wavered on the question of German partition when post-war policy planning began in 1943 at Moscow then Tehran and a strong anti-partition view continued to filter through discussions in 1944 and 1945.²² The vocabulary of ‘dismemberment’ was prominent in pre-Potsdam negotiations but did not follow into the final agreements recorded at the key 1945 conferences nor into the terms of surrender signed by the German High Command at the Rhine on 8 May 1945. The Yalta Conference clarified that the Allied purpose was not ‘to destroy the people of Germany’.²³ Stalin marked the occasion of German surrender by refusing to commit to a peace map that would replicate Hitler’s ambition to dismember the Soviet state. Even in full view of the ‘wolfish habits of the German ringleaders, who regard treaties and agreements as an empty scrap of paper’, the Soviet leader would not submit his people to a plan ‘to dismember or destroy Germany’.²⁴ To deliberately eliminate the word ‘dismemberment’ from the relevant international agreements did not signify, however, a more benevolent intention to abstain from using international law to frustrate national solidarity by territorial division. Philip Mosely noted in 1950 the contradiction whereby the term ‘dismemberment’ disappeared from the international legal record in 1945 at the exact moment when the ‘the partition of Germany was actually taking place’.²⁵

Alternative wartime proposals to restrict nationalist ambition included European federation or other territorial arrangements overseen by a supranational or international body in place of the failed League of Nations.²⁶ Though continental federation did not

20. Ibid part II(A)(3)(ii).

21. See eg Mosely (n 15) 488–91.

22. Ibid 489.

23. The 1945 Yalta Conference, 971.

24. Josef Stalin, ‘Victory Address (9 May 1945)’ (*Jewish Virtual Library*, 2018) <<http://www.jewishvirtuallibrary.org/stalin-s-victory-address-may-1945>> accessed 2 March 2018.

25. Mosely (n 15) 498.

26. For details, see eg Mark Mazower, *Dark Continent: Europe’s Twentieth Century* (Penguin, London 1999) 200–206.

materialise during the 1940s, there was a broad commitment among Allied states to articulate a geopolitical solution for peace that began with the reorientation of Germany.²⁷ Its ultimate form included a continuation of the pre-existing federal composition of *Länder* or *Laender* (states) within the simplified frame of international occupation. Arendt considered the division of occupied Germany into *Laender* with extensive powers of local self-government was ‘indisputably right in so many ways’ because it created an opportunity for Germans to rebuild, from the ground up, public morality and community. The plan would inhibit the accumulation of power, prepare Germany for European federalisation, and allow Germans to practise grass-roots democracy in place of centuries of thinking in continents. This was the ‘only political field where Germans have been left alone almost from the beginning of the occupation, and where the success or failure was independent of Germany’s status on the international scene’.²⁸ Figure 2 demonstrates the two cartographical layers of peace agreed at Potsdam. The significance of the federated structure of post-war Germany for international relations was its recognition that world peace is a question requiring attention to political processes and cartographical planning within and beyond the state. The balance between the two layers of territorial administration unlocks the meaning, *in situ*, of peace.

That international law could be the mechanism of world order and lasting peace and that, at least for the chief Allied powers (Britain, France and the United States), its design would be democratic was thematic from the early 1930s and intensified during war. It was also apparent that peace was a cartographical question and that a peace-map could take multiple forms. The American geographer George Renner repeatedly made the case for using geography and map-making in the international design for world peace.²⁹ He insisted the war revealed geographical truths about the strategic vulnerabilities and opportunities of states that required a new form of ‘peace by the map’ that conceived the world and human relationships in a ‘planetary or global setting’ and made inter-state solidarity a question of ‘concrete geographic reality’ and planning.³⁰ The hurdle for peace in the 1940s was ‘that few people can read maps, fewer yet can interpret them, and only a very few can make them. And yet there are fewer things more necessary than map skills’.³¹ In February 1942, commercial map sales soared when President Roosevelt told Americans to purchase a map of the world to understand what was happening and prepare for peace in global perspective.³² The Allied powers displayed posters of the Potsdam map throughout post-war Germany for similar ends. The tactic extended Roosevelt’s plan, for public understanding of what was happening during war, to the German people after Germany’s defeat by publishing a visual reminder of the territorial settlement. Maps became a technique in post-war Germany for implementing the commitment of the Potsdam Protocol ‘[t]o convince the German people that they have suffered a total military defeat and that they cannot

27. Ibid 228–32.

28. Arendt, ‘Report from Germany’ (n 2) 352.

29. See eg George T Renner, *Global Geography* (Thomas Crowell, New York 1944); George T Renner, ‘Maps for a New World’ (*Collier’s Weekly*, 6 June 1942) <<http://www.unz.org/Pub/Colliers-1942jun06-00014>> accessed 19 February 2018; Susan Schulten, *The Geographical Imagination in America, 1880–1950* (Chicago UP, Chicago 2001) 138–43.

30. George T Renner, ‘Peace by the Map’ (*Collier’s Weekly*, 3 June 1944) <<http://www.unz.org/Pub/Colliers-1944jun03-00044>> accessed 19 February 2018; George T Renner, ‘What the War has Taught Us About Geography’ (1944) 43 *Journal of Geography* 321, 323 and 326.

31. Renner, ‘What the War has Taught Us’ (n 30) 325.

32. Schulten (n 29) 204.

Figure 2 Zones of Allied Occupied Germany and the Länder, 1947³³

escape responsibility for what they have brought upon themselves' (Art II(A)(3)(ii)). Territory and its cartographical representation is, as Stuart Elden suggests, a political

33. Source: Andreas Kunz (ed), 'Zones of Allied Occupied Germany and the Länder 1947' (IEG-Maps, Institute of European History, Mainz 2005) <http://germanhistorydocs.ghi-dc.org/map.cfm?map_id=525> accessed 19 February 2018.

concept and a political practice that organises, genealogically and institutionally. He says the key to understanding is always ‘what kind of map is required, or what kind of cartographic techniques are needed for the production of territory’.³⁴ A time-map recalls the historical production of territory and the historical patterns produced and reproduced by law.

2.2 The repetition of historical patterns

One way to reinscribe the Potsdam map as a time-map for international legal history is to notice its success in resetting and affirming historical practices of territory and the political, economic and social effects produced by those practices. Part of the problem, as Arendt observed, was the continuing dysfunctionality and disjunctions of the Laender system that did not resolve under the new divisions of occupation. The occupiers’ failures or responsibility to correct the challenges of internal self-administration does not, however, elucidate the patterns of international legal time. Those patterns concern international histories repeated under and resulting from international occupation. Recent critical histories of Allied occupation revise earlier, more favourable accounts of the success of democratisation in the western zones.³⁵ However, many at the scene, including Arendt and Western international lawyers, observed a less benign situation that inhibited the post-Nazi state’s re-entry into international affairs. This view is consistent with the intention for retribution, political reordering, decentralisation, and economic control preoccupying the text of the Potsdam Protocol. Political, economic and social administration in or across the four zones permitted the past – as patterns of sovereign inequality, human displacement, political instability and totalitarianism experienced during war by the victims and enemies of the Reich – to return as the unintentional or unannounced effect for Germany and Germans of the deliberate legal design.

Some are more forgiving of the occupiers’ interventions or failings than others, including Arendt. Arendt’s concern about the faults of the Laender, for example, impugned the absence of any authentic will among Germans for local self-government and public responsibility rather than addressed the practical challenges presented by international occupation for the cohesiveness and agency of municipal bodies. The historical record focuses, however, not on judgment or explanations but rather on the facts that followed the legal arrangement and continued under international watch. Two key aspects of the occupation arrangements clarify the manner in which history returned. First, the dismemberment of the nation-state compromised German sovereignty and turned its newly divided territory into an experimental site for a new kind of world war. Second, the facts of occupation remodelled wartime methods for the persecution of peoples. These two aspects of time-repetition concern the new status of Germany under international law and the new experiences introduced by occupation for the German people.

2.2.1 New terms of occupation, regional instability and war

The Potsdam map literally exchanged one occupier for another, turning the experience of German occupation in the liberated countries, including France, back on the German

34. Stuart Elden, *The Birth of Territory* (Chicago UP, Chicago 2013) 326.

35. Francis Graham-Dixon, *The Allied Occupation of Germany: The Refugee Crisis, Denazification and the Path to Reconstruction* (IB Tauris, London 2013); Giles MacDonogh, *After the Reich: The Brutal History of the Allied Occupation* (Basic Books, New York 2007).

state. The difference now was the fact of total surrender, which meant that occupation was not belligerent, there being no war after 8 May 1945, and therefore it was not of the kind outlawed by international law.³⁶ Nevertheless, allied occupation of post-war Germany had the same trappings as the wartime category because it conferred legislative, judicial and executive competence on the occupant states even if it did not intend annexation. Ultimate competence in matters of internal governance also meant the occupiers, as territorial sovereigns, carried significant responsibilities for what happened to the vanquished state and its people and for the timeline of Germany's reconstruction and eventual return to the international community. An occupied Germany could not self-govern or speak on its behalf in the sphere of international relations because it was not a sovereign state under international law.³⁷ A loss of sovereignty diminished the options of centralised government to determine the terms of Germany's re-entry into international affairs and its obligations under international law. The Potsdam Protocol confirmed in treaty form what the 1945 Berlin Declaration settled in fact. Hans Kelsen observed Germany's loss of sovereign status immediately after the Berlin declaration meant there was no 'independent government' recognisable in international law: 'By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state'.³⁸ For Kelsen, the absence of a sovereign German government undermined territorial competence in matters of constitutional design, citizenship and the negotiation of settlements but protected the occupiers from accusations of illegality. It also restricted how the Laender worked and the success of internal coordination across the various zones of occupation.³⁹

The reality of allied occupation also undermined the legitimacy and effectiveness of the Potsdam Protocol as a plan for immediate regional security and as a precursor to German reconstruction. Dismemberment deliberately prevented the reconsolidation of German politics, markets and military capacity and inhibited the resurgence of nationalist sentiment by disabling state-centred systems for education, social projects and communication. The deleterious effects of a divided Germany on German stability did not resolve by agreement for the uniform treatment of the German people and the coordinated administration of the four occupied zones. The Potsdam Protocol

36. Article 43 of the Hague Regulations restricts an occupant from altering domestic laws during war, except as necessary for military purposes. Annex to Convention IV, 'Regulations Respecting the Laws and Customs of War on Land' (adopted 18 October 1907, entered into force 26 January 1910) section III, 'Military Authority Over the Territory of the Hostile State', art 43: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

37. Hans Kelsen, 'The International Legal Status of Germany to be Established Immediately upon Termination of the War' (1944) 38 AJIL 689, 689; Hans Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin' (1945) 39 AJIL 518, 519; Josef Kunz, 'The Status of Occupied Germany under International Law: A Legal Dilemma' (1950) 3 The Western Political Quarterly 538, 559.

38. Kelsen, 'Declaration of Berlin' (n 37) 519.

39. For example, contemporaneous readings of the Laender constitutions noted the concession to the occupiers' vision for the application of international law to municipal law, and that this arrangement altered earlier provisions in the Weimer Constitution that sought to vary the authority of outside laws. It was arguably a half-truth for the US Military Governor to suggest that the Laender constitutions could be 'German in origin, spirit, and preparation' when validity depended on approval of the occupying authority. See eg Lawrence Preuss, 'International Law in the Constitutions of the Lander in the American Zone in Germany' (1947) 41(4) AJIL 888, 890.

led to four 'airtight' zones with negligible opportunity, as the American military governor General Lucius Clay noted in 1946, for exchange of commodities and persons, let alone ideas.⁴⁰ Though the physical, economic and social effects of war created obvious difficulties for administration, disagreement among the occupiers on key points of governance ideology and implementation amplified the practical difficulties of stabilising the region. Self-interest and internal disagreement deprioritised the occupiers' common interest in a recalibrated Germany which could re-enter international society as a collaborative, democratic member. Two key divisions among the occupying powers set the background for the new forms of inequality, domination and friction typifying the experience of Germany after the war.

The first related to the ideological division between West and East and the second reflected the stubbornness of French policies for the dismemberment of Germany. Both pitched the sovereign self-interests of outsiders against the economic and political unity of Germany and the social recovery of its people. In the first division, ideological differences between the Western allies and the Soviets quickly shifted the defining question for all occupiers from German reconstruction and stability to the question of their own stakes in the regional and global distribution of geopolitical power.⁴¹ History remembers the Cold War as the sequel that followed the dramatic adjustments to the Potsdam arrangements in 1949 and produced two German states. The western German Federal Republic, comprising the three former zones occupied by the liberal allies, emerged as a single political unit on 12 May 1949 subject to continuing administration by the liberal occupant powers. Alongside the German Federal Republic was the new, Soviet-styled and Soviet-occupied, German Democratic Republic, formed on 7 October 1949 in response to the political consolidation of the western state and without recognition by the liberal states.⁴² The first phase of the international occupation of Germany concluded when these events formally ruptured the collaborative arrangements agreed at Potsdam. The 1949 division of Germany brought into historical consciousness the reality of the new kind of international war.

The historical pre-eminence of the 1949 split distracts attention from the fundamental differences which existed between the liberal occupiers until the creation of the two German states. Proposals from 1945 for the economic and administrative fusion of the three western zones of occupation failed despite protracted, repeated negotiations throughout the first period of occupation.⁴³ The British and Americans agreed to the economic unification of their zones in December 1946 and extended their arrangement

40. Mosely (n 15) 498, quoting Lucius Clay, *Decision in Germany* (Doubleday, New York 1950) 73.

41. Mazower (n 26) 240–49.

42. See 'Agreements on Germany between US, France and UK: Basic Principles for Merger of Three Western Zones of Occupation, and Other Matters' (signed 8 April 1949, entered into force 21 September 1949) 63 Stat 2817 (Agreements on Germany); 'The Bonn Constitution' (Basic Law for the Federal Republic of Germany, Approval by Western Military Governors) 1949 in US Department of State, *Documents on Germany 1944–1985* (Department of State Publication, Washington 1985) 221–57; and 'The Constitution of the German Democratic Republic 1949' (adopted in Berlin) in US Department of State, *Documents on Germany 1944–1985* (Department of State Publication, Washington 1985) 278–306.

43. The British and American zones of occupation were merged in early 1947 by the 'Bizonal Fusion Agreement: Memorandum of Agreement between UK and US on the Economic Fusion of their Respective Zones of Occupation in Germany' (signed 2 December 1946, entered into force 1 January 1947) 61 Stat 2475. Extensions to the Bizonal Fusion Agreement followed in 1947 and 1948. Repeated attempts to negotiate a Trizonal agreement that would merge the

several times until France, Britain and America reached an arrangement for tripartite control in anticipation of the transition to full self-governance of the German Federal Republic.⁴⁴ That agreement marked the commencement of the second period of allied occupation which concluded when the Bonn–Paris Conventions took effect on 5 May 1955.⁴⁵ The liberal occupiers retained ultimate legislative and administrative authority during the period of political and economic transition between 1949 and 1955 and made specific agreement as to the content and extent of the tripartite controls.⁴⁶ The question here concerns the effects of delaying economic and administrative fusion in the western zones of occupation until 1949. The purpose of the original proposal by the British and Americans for joint financial responsibility was to pool resources to support the achievement of a common standard of living. France was unwilling to compromise its historical commitment to German dismemberment despite repeated urgings and aborted negotiations with Britain and America. Dismemberment continued to be a self-serving strategy for national security in a context in which regional security depended on finding cooperative solutions to establish a new German state and a new ethic of international cooperation.

2.2.2 *New forms of socio-political injustice*

The socio-political experience of post-Potsdam Germany returned the experience of war in unexpected ways by underwriting new iterations of historical suffering and domination as features of international administration. History turned against Germany but not only as the ironic gesture of fate or, as Arendt suggests, due to inattention by the German people. Occupation revisited the past on a new set of victims in the context of governance strategies permitted by the international arrangement, including problems exacerbated or left unsolved by the failure to adequately support German reconstruction. Three examples link directly to the territorial and governance arrangements mandated by the Potsdam Protocol: the loss of political and civic sovereignty inside the German state; the resurgence of terror as a governance strategy in the Soviet quarter; and the challenges of forced migration of Germanic peoples expelled from neighbouring eastern states.

The first example addresses the social, economic and political repercussions for internal sovereignty when Germany ceased to be the invader and became the occupied state. A sovereign state is an entity that not only looks like a state but also acts like a state in the well-known tradition articulated by the 1933 Montevideo Convention.

Bizone with the French zone were unsuccessful before the establishment of the German Federal Republic in 1949. The three-power occupation continued after that event by cooperation between the three occupying states.

44. Agreements on Germany. Ms Lesley Dingle, the International Law Librarian at the Squire Law Library (University of Cambridge), provided invaluable assistance in sourcing the various negotiations and agreements relating to the question of economic fusion of the Western zones of occupation between 1945 and 1949.

45. ‘Convention on the Settlement of Matters Arising out of the War and the Occupation between the UK, France, USA and the Federal Republic of Germany’ (signed 26 May 1952, amended by Schedule IV of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany 23 October 1954, entered into force 5 May 1955) 1656 UNTS 29.

46. By comparison, the military presence of the Soviets in the German Democratic Republic continued throughout the Cold War and until 1994, after German reunification in 1990 and the dissolution of the USSR in 1991.

Territory, a permanent population, government and the capacity to enter into relations with other states are the indicia of statehood that were no longer obvious (let alone robust) for Germany in the period immediately following war. Germany did not go bankrupt nor was there famine or revolution. Before its industrial resurrection after occupation, however, Germany was socially and economically in ruins, suffering from destroyed infrastructure, under-employment, housing and food shortages, and a devastating dip in moral and political self-esteem and civic cohesion. Those factors visited the vanquished as a direct consequence of war, including the devastating effects of Allied bombings. If occupation exacerbated the loss of German sovereignty, it did so in at least two respects. The cartographical divisions decided at Potsdam inhibited, by design, the political resurrection of the German state as a self-governing entity that could enter international relations on its own terms. Occupied Germany looked theoretically like a state with a people and a territory demarcated by an outer boundary but could not function, either internally or externally, like a state without a central government and political autonomy.

Allied occupation also restricted civic, economic and ethical regeneration by not delivering a coordinated solution for those challenges, despite the plan for collaborative governance via a Central Control Council (Potsdam Protocol Parts I and II).⁴⁷ For example, the economic principles governing allied occupation sought to balance the desire to eliminate Germany's war potential with the needs of its peace economy (Potsdam Protocol Parts II and III). The trouble was how to achieve that balance and where responsibility should lie when military disablement mandated a decentralised economic structure (Potsdam Protocol Part II(12)) and when the tasks of social and economic reconstruction would find greater support in a coordinated economic plan unburdened by punitive reparations and allied self-interest. The Potsdam Protocol took special care to ensure the satisfaction of reparation claims of each occupier from resources within its zone of occupation, supplemented by capital from German external assets or, as the case may be, from the Soviets or from surplus identified in the Western Zones (Potsdam Protocol Part III). Although the details were a question for practical implementation by each occupier according to the resources available to them and in their zone, there was an express, albeit limited, expectation for offsetting reparations by return payments in kind. That is, the reparations scheme determined by international agreement obliged the occupiers to give fair exchange for reparations in the form of food and other commodities needed to galvanise the German peace economy. The frustration of a coordinated and fair strategy was immediately apparent in the ideological divisions between the Soviet and Liberal occupiers and internally, within the liberal zones. The French zone, for example, deployed what Rebecca West refers to as an 'Old Testament' strategy of governing that prioritised retribution and self-interest, and included the export of food from Germany to France.⁴⁸

Ideological disagreement about the meaning and objectives of the state also meant that the Western and Soviet methods of governance and moral regeneration in Germany were at radical cross-purposes. Not only did these differences restrain diplomatic cooperation at the Central Control Council (and explain the eventual splitting and reorganisation of Germany in 1949), it meant that the experience of occupation

47. Potsdam Protocol. See Parts I and II(A)(1), 'Establishment of a Council of Foreign Ministers' and 'Political Principles' in 'The Principles to Govern the Treatment of Germany in the Initial Control Period'.

48. Rebecca West, 'Greenhouse with Cyclamens II' in West, *A Train of Powder: Six Reports on the Problem of Guilt* (Virago, London 1984) 147.

in the Soviet zone reversed the experience of totalitarianism against all Germans. The history of Nazi terror replayed with alarming alacrity in the Soviet zone. There, international agreement and a lack of coordination turned the techniques of terror back on Germans not as perpetrators or witnesses, but as potential victims. Eye-witness accounts, such as those recorded by West in the second part of her report on the Nuremberg trial, noted the irony when the threat of forced disappearance became the daily experience of ordinary Germans.⁴⁹ Alongside the refashioned dangers of the Nazi regime were the continuing social effects of war experienced in all zones of occupation. Poverty, unemployment, food shortages, and the alarming influx of new refugees and new forms of homelessness left Germany vulnerable to a new ‘political vacuum’ which amplified the difficulty for everyday Germans to ‘face the reality of their destroyed country’ or, as Arendt suggests, to face responsibility for their Nazi past.⁵⁰

The third example of how history turned back against Germany under international military occupation relates to the challenges of forced migration. Article XII of the Potsdam Protocol made provision for the orderly transfer and distribution of German populations expelled from Poland, Czechoslovakia and Hungary after liberation. International provision for the manner of transfer sought to minimise the practical burden of new migrants on regional capacity and order, especially in the occupied zones. The irony of the post-war phenomenon of forced migration of Germanic peoples from the East was, of course, its repetition of the historical expulsions by Germans in response to the experience of Nazi rule in those states. West criticised the hypocrisy of the ‘humane and orderly’ direction of Article XII:

It was fatuously stipulated at the Potsdam Conference that the expulsions must be conducted ‘in a humane and orderly manner’. But it must have been obvious to any sane persons that only in an inhumane and disorderly manner could some millions of people be set down (with no more property than they could carry) in a strange land where there was already a housing shortage and the social and economic system was in ruins.⁵¹

The Western democracies did not accommodate the new migrants. That irony would not be lost on Arendt, whose experience of Jewish exile put her, only five years previously, in the shoes of German minorities who left their homes, like her, with only the possessions they could carry.

Arendt emphasises the habitual transformation of the past into the present at pivotal junctures in her analysis of the roots and techniques of mid-century terror; in her post-war appraisal of the social, economic and political scene in Germany under occupation; and in her analysis of modern revolution and violence.⁵² Although she was careful to absolve the occupiers of fault and does not analyse the methods agreed by international agreement, she was alert to the multiple ways in which radical exclusion repeats as a historical pattern. These existed in the post-German state but were not, in her expectation, exclusive to it. She anticipated the repatterning of statelessness

49. Ibid.

50. Arendt, ‘Report from Germany’ (n 2) 350 and 353.

51. West (n 48) 144.

52. Arendt, *Origins* (n 1); and Hannah Arendt, ‘Mankind and Terror’ (German speech for RIAS Radio University, 23 March 1953, Robert and Rita Kimber trs) in Hannah Arendt, *Essays in Understanding* (Schocken Books, New York 1994) 297–306. Her study of modern revolutions presents a further example of the reiteration of the endless cycle of repressive rule, violent upheaval, regime change and transformation of new regimes into new forms of oppression: Hannah Arendt, *On Revolution* (Penguin, New York 1963).

(which did repattern in the emergence of the new post-war minority of Germans); totalitarian government (again, the experience of Germans in the Soviet zone); and the arrangements of international occupation before and after war (which was, of course, the key technique of the Potsdam Protocol). She refers, for example, to the 'ever-growing new people comprised of stateless persons' across Europe during the inter-war years; to her expectation that terror would not disappear with the fall of the Nazi state but rather take its 'full expression' or 'authentic form ... only when totalitarianism has become a thing of the past'; and to the unsolved challenges of imperial domination, conquest and territorial divisions for human safety before and after war.⁵³ Arendt envisages the repetition of human catastrophe to be the imaginative consequence of predatory desire for new forms of terror and new categories of exclusion and domination.⁵⁴

3 TIME-MAP II: ARENDT'S REVOLUTIONARY TIME-CIRCLE

A second time-map draws on Arendt's idea of politics and historiography to explain the repetitive history recorded by the international arrangements for post-war Germany.⁵⁵ Arendt does not disagree with time-repetition, as an empirical fact, but her historiography imagines that history follows a circular pattern which leaves options for innovations and new histories. The detail is important for two reasons. First, a circular model of time highlights Arendt's disagreement with the modern idea of history as a predestined process which she says legitimises totalitarian government and its recurrence; and second, her time-circle articulates an alternative idea of history where every ending leads to another (sometimes novel) beginning. According to her circular model of time, international law follows the passage of historical time whether history repeats or begins an entirely new cycle which breaks with the past.

The idea of a time-circle distinguishes Arendt's historiography from the modern idea of history as an unending process which travels in a single linear line towards a predestined goal. Arendt agrees that historical experience is linear and that natural processes are part of the backdrop or context against which human history occurs. She disagrees with the Marxist idea of history which she says distorts the patterns of linear time and natural recurrence to legitimise the ideological goals of totalitarian government. The modern idea of history borrows the logic of nature which occurs in an endless repetitive cycle – which Arendt agrees is nature's habit of seasons, tides and days long ago confirmed by the classical tradition – but assumes history is a result of the unending metabolism of nature and human labour that moves not cyclically, consisting of beginnings and endings, but in a continuing rectilinear line. The idea is troubling because it predestines totalitarian history. For example, the laws of motion evident in the Marxist, and then Soviet, schema of history assume that certain corrupt or harmful classes would 'die off' or 'wither away' in a war between the classes. In its

53. Arendt, *Origins* (n 1) 277 and 460–61; Arendt, 'Mankind and Terror' (n 52) 306.

54. *Ibid.*

55. Hannah Arendt, 'The No Longer and Not Yet' in Arendt, *Essays in Understanding* (n 52) 158–62; Hannah Arendt, 'Preface: The Gap Between Past and Future' and 'The Concept of History: Ancient and Modern' in Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Penguin, New York 2006) 3 and 41; Hannah Arendt, 'The Gap Between Past and Future: The *Nunc Stans*' in Hannah Arendt, *The Life of the Mind* (Harcourt, New York 1978) 202–13.

racial variation preferred by Nazism, the laws of motion evident in nature require the elimination of certain races identified as parasitic or unfit to live. Here, the ‘laws of killing’ were natural laws that followed the same logic as the modern historical principle. The error in both cases is to make politics the derivative of history or nature or, as Arendt says of the Marxist idea of history, to derive ‘political conscience from historical consciousness’.⁵⁶

The concept of history as process problematises the linear motion of time by forgetting the individual’s power to re-enter and exit history as an agent, and by confusing the laws that follows from historical experience and result from agreement with the laws of the movement. In the place of agency and innovative laws, the Soviets and Nazis substituted the law of the movement. Arendt explains the history as process concept as the wrong matching of natural and political processes:

[H]ere the process of history, as it shows itself in our calendar’s stretching into the infinity of the past and the future, has been abandoned for the sake of [an] altogether different kind of process, that of making something which has a beginning as well as an end, whose laws of motion, therefore, can be determined (for instance, as dialectical movement) and whose innermost content can be discovered (for instance as class struggle) It cannot bestow meaning on particular occurrences ... because it has dissolved all of the particular into means whose meaningfulness ends the moment the end-product is finished.⁵⁷

Arendt’s critique of the modern concept of history contains a normative proposal. She invites legal innovations which arise from human intervention and choose political freedom as an alternative to ideology.

A time-circle schematises Arendt’s alternative to the modern idea of history by suggesting that history is both linear (insofar as it tracks a story of events) and follows a circular pattern with endless opportunities for beginning. A map of historical time as a circle makes sense of her approach to writing history or how she reads and responds to archival sources. Jonathan Schell explains Arendt’s history-method as ‘more deductive than inductive’, like much of her theory, because her history-writing ‘crystallises’ around specific events.⁵⁸ Her historiography complements her non-systematic approach to historical facts by rejecting the systematic or predestined idea of history she identifies as the root of totalitarian ideology. In her estimation, history is simply the ‘telling-over’ of specific, often haphazard, events and deeds which occur in the ordinary course of political life and are, sometimes, exceptional. A circle makes room for the decisions and choices of the individual agent and her community, and accepts that individuals, or states, can make errors of judgment that lead to time-repetition. A circle also assumes a full revolution is likely and will reconstitute or refound the political, supported by a new law, and trigger an entirely new cycle of experience. The same opportunities for democratic action which coordinate Arendt’s theory of politics and political revolution enliven her vision of historical experience as wholly contingent on choice.

The Potsdam map ceases to be a tragic reminder of time-repetition if it is, as Arendt’s historiography suggests, simply one expression of the circular habits of historical and legal time. Time-repetition happens when an ending – of a war or other mundane event – does not prompt a correction to historical experience. In either

56. Arendt, ‘The Concept of History’ (n 55) 77–9.

57. Ibid 79–80.

58. Jonathan Schell, ‘Introduction’ in Arendt, *On Revolution* (n 52) xi–xii.

case, international law follows and confirms the choices of history and records those choices by redrawing and conditioning the lines of sovereignty in the form of geographical maps. Arendt's invitation is to watch for the openings at the end of each cycle when international law, again tracing the historical record, announces the agreement by states to create a new situation.

4 TIME-MAP III: TIME-GAPS AND IN-BETWEENS

A third time-map accentuates a detail of Arendt's time-circle and interprets it as an opportunity for legal innovation. Arendt attaches importance to what she names 'the gap between past and future', 'the in-between' or the 'no longer and not yet' when time swings full circle but before its renewal. The interval describes the present, which is the ubiquitous moment when action occurs and there are choices about what to remember and what to do next. Collective tragedies such as war, genocide and forced migration highlight the imperatives of acting into the present through law-making, memory projects or political revolution to dramatically reshape historical consciousness and redirect the future. The significance of the present as the place of ethical gesture and reconstruction that prises the past from the future marks a shift from the empiricism of Arendt's history-writing and historiography to normative suggestion. For international lawyers, Arendt's time-gap reconceives the Potsdam map as a history-response belonging to the contingent moment between the end of the Second World War and the beginning of the Cold War when the options for designing peace were open. Any error in the plan for Germany foreshadowed the political cleavages of 1949 but did not foreclose, even then with the seemingly permanent fracture of two states, further international intervention. Arendt's invitation is to notice the poetic options, to follow Brett's suggestion, that become apparent for law from its broader intellectual setting.⁵⁹

4.1 A time-gap as a spatial arrangement

The concept of a time-gap extends Arendt's idea of history in sync with her theory of politics. For a writer preoccupied with the territorial effects of political history, the concept is the least concrete aspect of her reflections on time. It is also the only idea Arendt represents with a drawing. The idea of a time-gap inspired Arendt to draw her own time-map. She envisages the gap between time to be the pivotal juncture for historical understanding and ethical response because it is simultaneously the place of origin (where we come from and depart) and our destiny (the place of arrival or completion). The cartographical challenges of the time between past and future arise from its transitory character. Its mobility designates the present as the formless 'opening of an abyss of empty space and empty time', a 'non-time space', the 'Void' that is 'nowhere' being 'liberated from all spatial categories', 'an historical no-man's land', 'a timeless, spaceless, suprasensuous realm' analogous to thought itself and 'the quiet in the centre of the storm'.⁶⁰ Arendt's time-gap is the paradoxical realm of being or

59. Brett (n 5) 123 and 127–8.

60. Arendt, 'The No Longer and Not Yet' (n 55) 158; Arendt, 'Preface' (n 55) 11; Arendt, *The Life of the Mind* (n 55) 202, 206 and 209–10.

experience that is nowhere. The lack of materiality of the present moment makes sense of its position as ‘the location of thinking ego’ in a time that:

would be the in-between of past and future, the present, this mysterious and slippery now, a mere gap in time, toward which nevertheless the more solid tenses of past and future are directed insofar as they denote that which *is* no more and that which *is* not yet.⁶¹

Yet, Arendt repeatedly seeks to navigate the in-between as a spatial reality or a location. The time-gap marks the time *when* politics occurs by designating it as the *place* of action, change and agency. Her search for form inspired her to include a drawing of a parallelogram in her last essay about the idea, written shortly before her death. The image presents a third time-map, imagined by Arendt as her history-response, with which to focus the international legal question about the cartographies of time.

Arendt’s time-map represents a conscious effort to rearticulate the present as somewhere we can find our ‘bearings’ and ‘take our place in the world’ to navigate our part in history.⁶² The switch in vocabulary from using words to illustration emphasises the difficulty, for her, of articulating a different idea of historical consciousness with which to encounter and respond to historical trauma. A drawing or map of time reconceives the mobility of passing time as somewhere each generation navigates or moves (not the passive, process-orientated *be* moved), as through a landscape. The map makes visible the potentialities of choosing and acting into history. Since the present is the ‘abyss of freedom’, by which Arendt means political freedom, its visual translation is also the key for unlocking repetitive histories. The gap becomes a dimension or a time-zone by reference to the limit or boundary of what lies behind and what approaches.

Arendt elaborates the visual story of *where* we are in time with an allegory borrowed from Franz Kafka. She retells Kafka’s story of a battle that occurs in the time in-between past and future in several essays, the first version which she wrote

Figure 3 Arendt’s drawing of the location of the present between the past and future⁶³

61. Arendt, *The Life of the Mind* (n 55) 208.

62. Arendt, ‘The Gap’ in Arendt, *The Life of the Mind* (n 55) 205. For a copy of Arendt’s drawing of her conception of a time-gap, see Figure 3 and fn 63.

63. Ibid 208.

in the first year of allied occupation of Germany in 1946, and the last immediately before her death in the early 1970s. Kafka's protagonist dreams that 'HE' stands between and defends himself against two antagonists:

[T]he first presses him from behind, from his origin. The second blocks the road in front of him. He gives battle to both. Actually, the first supports him in his fight with the second, for he wants to push him forward, and in the same way the second supports him in his fight with the first, since he drives him back. But it is only theoretically so.⁶⁴

For Arendt, and for the states which gathered in 1945 at Potsdam, how to react to the past and encounter the future was not *only* a theoretical question but a critical history-making decision. The 'HE' is an archetypal hero who represents whosoever dreams of being at the cross-roads of time as a decision-maker, struggling with memory and destiny. Arendt gives a further detail which provides an important insight about the significance of what the archetypal hero, who is also every person irrespective of status, does or does not elect to do. Responsibility for the past exists in the present because it is from here, the place where we always stand, that history tracks into the future *or* is left behind. The dreamer wishes 'that some time in an unguarded moment ... he will jump out of the fighting line and be promoted, on account of his experience in fighting, in the position of umpire ...'.⁶⁵ The dream ends before the battle concludes and without insisting the dreamer be responsible as the third, necessary antagonist. Arendt disagrees with neutrality. To opt out of the contest between the past and the future misses the opportunity to take responsibility for history. That opportunity always remains.

Arendt's time-map articulates an alternative historiography which identifies the present time as the critical site of history in two senses. It delineates the past from the present ('the more solid tenses') by representing each as a spatial situation which become visible because of what passes in-between. As the location of the thinking mind, the gap is also a place of wakefulness, action and memory and designates a time which is ambulatory and contingent on who stands there and in what surroundings. Its aliveness is a reminder of the authority of the present to interpret history and influence future events.⁶⁶ The time-gap literally and visually breaks the rectilinear time-sequence that leads groups to stop thinking and acting; it reinscribes priority for the present as the location where the past and future happen through the action, reactions, interactions and inaction of those present. Arendt's idea of a time-gap contradicts the history as process ideal by making the present the constitutive location of public experience and by recognising how the ordinary person as a dreamer can act into history to determine its course.

It is no coincidence that the conception of Arendt's idea almost coalesced, and certainly developed in tandem, with the post-war meetings at Potsdam. In 1944, she wrote approvingly of Kafka's common 'man of good' as her ideal 'world-builder who can get rid of misconstructions and reconstruct his world' and foreshadowed the living presence of that hero in 'anybody and everybody, perhaps even you and me'.⁶⁷ She turned

64. Arendt, *Life of the Mind* (n 55) 202, quoting Franz Kafka in Willa and Edwin Muir (trs), *The Great Wall of China* (Schocken Books, New York 1946) 276–7.

65. *Ibid.*

66. Arendt, 'Preface' (n 55) 12–13.

67. Hannah Arendt, 'Franz Kafka: A Revaluation' (1944) XI/4 Partisan Review, reprinted in Arendt, *Essays in Understanding* (n 52) 69, 80.

the suggestiveness of allegory into a mandate for new forms of real-world heroism in 1945 and again in 1946 by arguing that responsibility for war-crimes extends beyond single perpetrators to the living in general, irrespective of the individual's or group's historical culpability.⁶⁸ Everyday heroism meant not believing the determinism of an 'inevitably superhuman law' and affirming, as an ordinary gesture of valour, the 'supreme faculty of creating laws ... and even prescribing them to nature'.⁶⁹ Arendt first referred to the 'time-gap' as the place for this everyday heroism in 1946. The timing is significant because Arendt clarified her idea of responsibility as a history-response when she became aware of the gravity and singularity of the chance for action facing the post-war generation.

As the reference for locating the past and future, the concept of a 'gap' in time takes on special significance or 'comes to the surface', as Arendt noted in her 1946 reflections, 'at some turning points of history' such as the end of war. These moments contain 'absolute interruptions' when every witness 'feels' time break, knows 'the decline of the old, and the birth of the new, is not necessarily an affair of continuity' and recognises themselves as innovators who can shape the future.⁷⁰ Some years later, Arendt reformulated her concept in similar terms to emphasise the significance of time-gaps as exceptional moments of worldwide concern when shared historical consciousness about catastrophe can motivate dramatic institutional change. She ties the chance to save the world, 'the abyss that yawns between the "no longer and not yet" of history, between the "no longer" of the old laws and the "not yet" of the new saving word, between life and death',⁷¹ to the exception:

[I]t would be of some relevance to notice that the appeal to thought arose in the odd in-between period which sometimes inserts itself into historical time when not only the later historians but the actors and witnesses, the living themselves, become aware of an interval in time which is altogether determined by things that are no longer and by things that are not yet. In history, these intervals have shown more than once that they may contain the moment of truth.⁷²

The meeting at Potsdam registered an opportunity for truth because all nations exhausted by world war expressed a desire to face what happened and find a solution to achieve stability in Europe. 'Truth' may be more elusive, depending, however, on the character of the initiatives which follow catastrophe. The time-gap may continue its passage through time without correction or other, remarkable shift. The turning of the millennium presents another example where the expectation of upset or change did not, in the event, become history.⁷³ The great disappointment or relief of history is, of course, when the expectation or concern for transformative change resolves without note and time relaxes back into its continuum.

68. Hannah Arendt, 'Approaches to the "German Problem"' (1945) XII/1 Partisan Review, reprinted in Arendt, *Essays in Understanding* (n 52) 106; Hannah Arendt, 'German Guilt' (1945) 12 Jewish Frontier, reprinted in Arendt, *Essays in Understanding* (n 52) 121 (republished as 'Organised Guilt and Universal Responsibility').

69. Arendt, 'Franz Kafka' (n 67) 74–5.

70. Arendt, 'The No Longer and Not Yet' (n 55) 158–9.

71. Ibid 162.

72. Arendt, 'Preface' (n 55) 9.

73. In her monograph on time, Hunt evokes the concept of a time-gap without referencing Arendt or borrowing her label to refer to the worldwide concern about the passage of time which occurs in anticipation of historical ruptures, such as the dawn of a new millennium in Western history (eg 2000 AD), when there was an expectation of global computer breakdown: Hunt (n 5) 6.

The choices made by the Big Three make sense of the time where they stood, desiring security, reconstruction and stability in Europe and the World, for themselves. The arrangement determined at Potsdam contributed to the recycling of experience not only for the occupied people and German state but also for the occupants. In the second case, the arrangements reaffirmed the hierarchical ordering of international relations among sovereigns. International occupation and administration were techniques of reconstruction complicated by the risks of imperial management, a lack of empathy for local dynamics and self-interest. These inclinations became divisive because each occupant state governed idiosyncratically as sovereigns, apart from the greater symmetry in the bi-zone created in 1946 and in spite of the formal intentions of the Central Control Council. The occupants executed a scrupulous plan for Europe which also achieved regional influence for each, vis-à-vis its allies, where influence meant security in ideologically turbulent times of alliance. Criticism is the easier reflex in hindsight but forgets that states were never charities and peace never mobilised by redacting sovereign will. Between Potsdam and 1949, Germany was in ruins; Britain and the USA coalesced in principle and proximity to the problem of Germany and to their strategic concerns farther afield; France remained tethered to its historical trauma and fear; and the Soviets' social, economic and political vision conditioned mutual distrust by and of it by the others. Arendt did not expect or propose a utopian solution but offers a reminder that history never just happens despite the broadcast by Marx et al. The time-gap is a line of light that outlines the door that invites an intrusion by each witness and to every newcomer who comes after. Arendt's concept consoles international lawyers alarmed at the disagreement and differences that inhibited peace and German reconstruction after Potsdam. Rather than tragedy, the time-gap highlights the mobility of history and the ever-existing chance for revision.

4.2 This world as we know it is passing away⁷⁴

Arendt's quarrel with modern historiography and history arises from her empirical observation that time passes but not as the unending, identical process made fashionable by modern ideologies associated with the totalitarian state. For history, her concept of a time-gap schematises the place where the past loops back to the beginning before time begins another idiosyncratic rotation. For international lawyers, gaps announce the coalescence of historical and legal time by reimagining the cartography of international history as a series of intervals for legislative initiative. Gaps often disappoint legislative ambition because each holds a normative expectation that the world as we know it not only *is* passing but that human intervention *can* and *should* determine what passes and what new arrangements emerge. Arendt's normativity avoids the dangers of ideology by substituting destiny or truth with choice. She asks each generation 'to gain experience in *how* to think' without 'prescriptions on what to think' because *how* we think in the present can recuperate the past from set meanings and open the future to difference. To interpret the past and envisage the future in the present means the 'problem of truth is kept in abeyance; the concern is solely with how to move in this gap – the only region perhaps where truth eventually will appear'.⁷⁵ Arendt's report on Germany under allied occupation criticises Germans because of their inattention to her question. What hope was there for difference if Germans abdicate their power to reign over their thoughts and therefore, over their past

74. Corinthians, 7:31.

75. Arendt, 'Preface' (n 55) 14.

and their future? Big-history moments exaggerate the normative promise and limitations of time-gaps as a chance for intergenerational responsibility. The normative subtleties of Arendt's idea challenge international lawyers to reimagine how they move in the present and rethink the traps of relaxing into its continuum. As Arendt suggests, the formula does not seal its prize. Dilemmas emerge even in the big-history moments or for those, like her, who diligently ask for correction and new forms of freedom.

First, because the normative imperative associated with time-gaps intensifies after dramatic history events, those intervals figure as normative contractions of singular and fleeting potential. A restraint on international law-making (and world-building) follows if, as Arendt suggests, the motivation for change which sometimes synchronises for multiple communities across the world does not continue after historical climax. The need for legal response also exists when the global experience of time returns to a less urgent, plural and syncopated rhythm. Everyday life holds different opportunities for legal experiment and adjustment by presenting for solution various challenges which call for a differentiated allocation of time, expertise and resources. Relevant triggers include issues, patterns or upsets of worldwide interest (climate change, education, scientific cooperation, international trade, telecommunications, aviation and shipping, etc) or questions which concentrate locally or regionally (natural disasters, civil war, famine, inequality, etc). The idiosyncrasies of international law-making exaggerate outside times of synchronic crisis to reveal a plurality of issues and interests and, importantly, tempos. The first category of challenge encourages law-making, which is patient, inclusive and comprehensive, while the second facilitates international regulation attuned to the urgencies and interests of affected communities. Non-synchronic moments highlight that time is not always singular or experienced in sync, but is more often plural and travels in multiple time-lines, each with its own rotation from beginning to end and with a unique clutch of relevant beginners. Arendt's interest in the turning points in history de-emphasises the priority she gives to the plurality of politics in non-exceptional time. The challenge of understanding the normative invitation of her time-gap for international law arises by testing its application as the engine room of politics, whenever it occurs.

When Arendt returns to the phenomenon of non-exceptional time she identifies the gap with thinking which extended, at least after Marx, beyond the realm of philosophical inquiry to politics and history.⁷⁶ That is, thinking became the method of politics when a philosopher sought to use ideas to change the world and realise philosophy in politics.⁷⁷ The modern age made ideas the very thing which could save or devastate a community. The shift meant thinking became a political imperative for every citizen who found herself standing in 'the very heart of time' not as the metaphysical 'I-and-myself' but as a member of 'a plural We'.⁷⁸ Arendt explains, 'when the thread of tradition finally broke, the gap between the past and future ceased to be a condition peculiar only to the activity of thought and restricted to the few who made thinking their primary business. It became a tangible reality and perplexity for all; that is, it became a fact of political relevance'.⁷⁹ The end of the Second World War clarifies the historical and political significance of the present by forcing communities to

76. Arendt, 'Preface' (n 55) 12–14; Hannah Arendt, 'The Abyss of Freedom and the *Novus Ordo Seclorum*' in Arendt, *The Life of the Mind* (n 55) 195.

77. Hannah Arendt, 'Tradition and the Modern Age' in Arendt, *Between Past and Future: Eight Exercises in Political Thought* (n 55) 17 and 39–40.

78. Arendt, *Life of the Mind* (n 55) 200.

79. Arendt, 'Preface' (n 55) 13. See also Arendt, 'The Abyss of Freedom' (n 76) 199.

respond despite being ill-equipped or unprepared for the task. Such events do not, however, deprive non-exceptional time of its political relevance as the place of thought and free will and action.

Second, if Arendt invites international lawyers into the heart of everyday time and radicalises it as the place of hope and freedom, the lack of a prior rule of determination presents further dangers. Her approach makes sense of her rejection of history as process. For the sake of that cause, Arendt deliberately refrains from telling her readers, who she envisages in the shoes of Kafka's present-day dreamer, how to move in the time-space between the past and the future. A difficulty arises because the space-in-between does not follow the ordinary logic of territory applicable to states and international relations. The gap is invisible to international law as a zone for cartographical organisation because it has no specific spatiality or order beyond its ever-shifting temporal borders. The gap is deliberately lawless and invisible to law. Arendt's description recalls Schmitt's account of the sea before it became a territory visible to international law and, consequently, capable of legal claim and cartographical designation. Whereas '[l]aw is bound to the earth and related to the earth' as the natural source of just rewards for manual labour, a place of fixed boundaries and a platform for human construction, the 'sea knows no such apparent unity of space and law, of order and orientation'. The axiom 'the freedom of the sea' made it the pirate's zone, free for booty and free from conscience because 'there were no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property'.⁸⁰ A place without a sacred horizon is free from law but not, as the dramas of piracy on the high seas show, free from fear and injustice.

The question which emerges from Schmitt's description of the open sea is whether Arendt's gap can ever be a place for freedom if there is no sacred orientation to guarantee rights of belonging. That is, does Arendt's time-gap lead her back to the dilemma of statelessness and to the borderless zone of fear which is not freedom, in a political sense, but rather the very condition of acute vulnerability and exposure from which she seeks to escape. Arendt admits the thinker (or dreamer) is free but 'homeless in an emphatic sense' and always encounters 'homelessness' when she thinks in the present moment.⁸¹ According to her own formulation, the story of freedom without law is much like the pre-modern sea without conscience, justice or laws of right or wrong. The subtleties of Arendt's theoretical argument nevertheless avoid the trap of lawlessness by clarifying her concerns with a different logic of territory that applies to her cartographical conception of time.

The paradox suggested by the immateriality of the present is superficial because it is only half of the story. Arendt does not dematerialise the present but rather unburdens its subjects of historical or institutional mandate and prioritises them as the thing that gives substance to the present and anchors the time-gap in the present, living world. She returns to the parable of the dreamer to make clear that it is '[o]nly insofar as he thinks, and that is insofar as he is ageless – a "he" as Kafka so rightly calls him, and not a "somebody" – does man in the full actuality of his concrete being live in this gap of time between past and future'.⁸² A 'he' or 'she' (not 'somebody') qualifies as the relevant subject because no prototype is present, actual and living so as to condition the time-less or spaceless in-between as somewhere real. Arendt clarifies, to repeat her reason for addressing questions of history and politics, that it is the incidents of lived

80. Schmitt (n 6) 42–3.

81. Hannah Arendt, 'Tantôt Je Pense et Tantôt Je Suis' in Arendt, *Life of the Mind* (n 55) 199.

82. Arendt, 'Preface' (n 55) 12.

experience that give the world meaning and materiality. In between time-less and fathom-less space, Arendt locates the living subject and political incidents as the ‘concrete guideposts’ by which the thinking ego takes its bearings. She does not particularise the living subject or suggest ‘he’ is somebody other than the Big Three or the German people, nor does she account for who did not or could not speak at Potsdam. She assumes agency where everyday life and sovereign inequality deprive the present of its potential plurality. The revelation for international lawyers is to notice themselves as potential contributors to the debate which arises in the present. The challenge for international law is to ask questions about who speaks and who is left behind because the materiality of time depends, according to Arendt’s idea of politics, on the interactions between a plurality of constituents.

5 THE POETICS OF THE FOURTH KIND OF SPACE

In 1895, fifty years before the Big Three met at Potsdam to draw lines through Germany for the future of peace in Europe, H G Wells used science fiction to present another cartographical explanation of time.⁸³ *The Time Machine* deploys the genre of fantasy to focus the Victorian reader on the imperative for new ways to move in the space in-between. The novella does not include maps for political or philosophical reference but imagines moving across time as a fourth dimension of space. The protagonist is identifiable only by his expertise as the Time Traveller. He says ‘any real body must have extension in *four directions*: it must have Length, Breadth, Thickness and – Duration’ and time is different only because ‘our consciousness moves along it’.⁸⁴ The Time Traveller exaggerates the obvious geometrical suggestion by inventing a machine to ‘travel indifferently in any direction of Space and Time, as the driver determines’.⁸⁵ The fantastic premise of time travel is interesting to international lawyers because it assumes the existence of a time-scape where human beings are master-agents who not only move across time but are responsible for every innovation and catastrophe. History never just happens for the Time Traveller but is a series of periodic stops where he meets himself as a tourist or an outsider, in another corner of his world which is simultaneously recognisable as his world and unrecognisable as his home in the ordinary time of his life-span on earth. The Time Traveller meets Arendt standing in the gap she encountered in 1945 when he stops in the year 802,701 AD and notices himself grieving for the brief dream of a balanced society that committed suicide and left a desolate scene reminiscent of Germany after war.⁸⁶ Wells sees ‘in the growing pile of civilisation only a foolish heaping’ and wonders ‘for I, for my own part, cannot think that these latter days of weak experiment, fragmentary theory and mutual discord are indeed man’s culminating time! I say, for my own part’.⁸⁷ The lack of a ‘culminating time’ in the present is where Wells and Arendt part.

Arendt envisages the present as the culminating time at the top of each full circle or revolution because it is the time for decision and action. The difference between Wells and Arendt is how each responds to the passing opportunity before the past drifts into

83. H G Wells, *The Time Machine* (first published 1895; Penguin, London 2012).

84. *Ibid* 2.

85. *Ibid* 5.

86. *Ibid* 83.

87. *Ibid* 99.

the future. Arendt gets caught in the tension between the ‘mental existences’ which are ‘immaterial’ and have ‘no dimensions’ and the physicality of the thinking subject who can face history and its errors. She takes the part of the first speaker who the Time Traveller corrects:

‘And you cannot move at all in Time, you cannot get away from the present moment.’

‘My dear sir, that is just where you are wrong. That is just where the whole world has gone wrong. We are always getting away from the present moment. Our mental existences, which are immaterial and have no dimensions, are passing along the Time-Dimension with a uniform velocity from the cradle to the grave. Just as we should travel *down* if we began our existence fifty miles above the earth’s surface.’⁸⁸

The activity of leaving the present in an imaginative sense refuses to believe in the immateriality of the imagination or of missed opportunities. Time-travel agrees with the possibility of time-maps but makes the imaginative vision the critical, material thing that outlasts the rubble, treaties, circles and lines, and unsurprisingly, survives the Time Traveller and his passing moment. The protagonist disappears at the end of *The Time Machine* without telling the journalist about the end of his journey. The master-agent continues his search for the ‘culminating time’ and leaves the reader to reimagine herself as a traveller in time. Arendt stays close to the historical facts, even where she urges her audience to move forward. She talks of beginnings and yet concentrates on what did not follow from the resolutions agreed at Potsdam.

Arendt returned to the 1945 settlements in a brief note to mark the 1967 publication of Karl Jaspers’ best-selling book, *The Future of Germany*. That book, like her 1949 report from the post-war scene, warns ordinary Germans about the dangers of time-repetition which follow from political apathy. Arendt agrees with Jaspers’ observations:

He is painfully aware of all that has remained constant, not in the circumstances of the world but in the inner condition and the behaviour of the people. This is not a question of an eternal German national character; it is a matter of typical and repeated behaviour patterns ever since Bismarck founded the German Reich. The danger now lies in the automatic consequences of the fact that ‘no new state emerged in 1945’, and that no clear break with the past, not even the Nazi past, was ever achieved. In its stead, there has spread a general ‘mendacity [that] pervades our political existence, and thus our personal one,’ the crucial lie ... ‘that the Germans were never really Nazis.’⁸⁹

Arendt surveys the ‘foolish heapings’ of the present, culminating time and criticises the habits which reproduce historical patterns and which continue to leave disappointments. Her facts miss the scientific possibility of time-travel and its everyday invitation to her, not only as an observer of historical error but as an author and cartographer of the imaginative details. The Time Traveller discovers how to move into the present and exceed history by believing in and envisaging alternative worlds. Arendt’s theory searches but never quite hooks the poetic opening of history for the future which locates in the Time Traveller’s ever-moving present. The imaginative alternative is the question apparent for the legal cartographer who enters that gap, over and over, with the vocabulary and expertise to move across time and translate the ambition for a revolution that breaks with the past into agreement.

88. Ibid 4.

89. Hannah Arendt, ‘Foreword’ in Karl Jaspers, *The Future of Germany* (Chicago UP, Chicago 1967) ix.